

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

MASONRY INDUSTRY TRUST)	NO. 10-CV-01575-HU
ADMINISTRATION, INC.,)	
an Oregon corporation,)	
)	
Plaintiff,)	FINDINGS AND
)	RECOMMENDATION ON
vs.)	MOTION FOR DEFAULT JUDGMENT
)	
MARK ARSENAULT, an individual,)	
doing business as WESTERN MASONRY)	
RESTORATION,)	
)	
Defendant.)	

Bradley L. Middleton
Bradley L. Middleton, P.C.
6950 S.W. Hampton, Suite 250
Tigard, OR 97223

Attorney for Plaintiff

HUBEL, Magistrate Judge:

On December 29, 2010, the plaintiff filed a Complaint under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 141 *et seq.*, seeking to recover from the defendant unpaid contributions to the Northwest Bricklayers Pension Trust Fund, the International Bricklayers Pension Fund, the Masonry Welfare Trust Fund (which includes the Masonry Vacation Trust Fund), the Masonry Industry Combined Apprenticeship and Journeyman

1 Training Trust Fund, and the Bricklayers and Allied Craftworkers
2 Defined Contribution Retirement Plan (collectively, the "Funds").
3 Dkt. #1, ¶ 2; Dkt. #20, Amended Decl. of Bradley L. Middleton, ¶ 3.
4 The plaintiff Masonry Industry Trust Administration, Inc.
5 administers the Funds. Dkt. #1, ¶ 1; Dkt. #20, ¶ 3.

6 The defendant was served personally on January 4, 2011. He
7 failed to move or plead in response to the Complaint, and on
8 February 22, 2011, the undersigned entered default against the
9 defendant. Dkt. #5. The plaintiff now moves for entry of a
10 default judgment against the defendant. Dkt. #16; see Dkt. #18 &
11 #20.

12 At all times relevant to the present action, the defendant was
13 signatory to a collective bargaining agreement ("CBA") with the
14 plaintiff, requiring the defendant to pay wages and make
15 contributions to the Funds on behalf of his employees. The
16 defendant failed to pay all amounts owing as required by the terms
17 of the CBA. Dkt. #1, ¶¶ 7-9; Dkt. #20, Ex. 1.

18 In addition to requiring monthly contributions to the Funds,
19 the CBA provides for liquidated damages upon default in the amount
20 of 10% of the delinquent amount owed to all of the Funds except the
21 International Fringe Benefit Funds, and 20% of delinquent amounts
22 owed to the International funds; interest at the rate of 18% per
23 annum for all of the Funds except the International funds, from the
24 delinquency date until paid, and interest on amounts payable to the
25 International funds at the rate of 15% per annum from the
26 delinquency date until paid; and attorney fees and costs (including
27 auditor's fees) incurred in pursuing delinquent payments. See Dkt.
28 #20, ¶¶ 7, 8, & 11; *id.*, Ex. 1, pp. 4-8, & Ex. 13, § 4.5.

A. 2009 Contributions

1. Delinquent amounts due

The plaintiff has submitted contribution reports prepared by the defendant showing the following sums owed to the Funds for 2009:

Amounts Due for October 2009:		
International Fringe Benefit Funds	\$	13.60 ¹
		851.20 ²
Masonry Industry Trust Fund		85.36 ³
		6,082.20 ⁴
Amounts due for November 2009:		
International Fringe Benefit Funds		394.40 ⁵
		11.40 ⁶
Masonry Industry Trust Fund		2,475.44 ⁷
		81.00 ⁸
Amounts due for December 2009:		
International Fringe Benefit Funds		39.90 ⁹
Masonry Industry Trust Fund		283.50 ¹⁰
TOTAL AMOUNTS DUE FOR 2009:		
International Fringe Benefit Funds		\$1,310.50
Masonry Industry Trust Fund		<u>9,007.50</u>
TOTAL DELINQUENT CONTRIBUTIONS for 2009		\$10,318.00 ¹¹

¹Dkt. #20, Ex. 3, p. 1.

²Dkt. #20, Ex. 5, p. 1.

³Dkt. #20, Ex. 3, p. 1.

⁴Dkt. #20, Ex. 5, p. 1.

⁵Dkt. #20, Ex. 3, p. 2.

⁶Dkt. #20, Ex. 5, p. 2.

⁷Dkt. #20, Ex. 3, p. 2.

⁸Dkt. #20, Ex. 5, p. 2.

⁹Dkt. #20, Ex. 5, p. 3.

¹⁰*Id.*

¹¹The court's calculation of the total for 2009 is in agreement with the plaintiff's calculation. See Dkt. #20, ¶ 4, p. 3.

Thus, the court finds the defendant owes the sum of **\$10,318.00** in unpaid contributions for 2009, representing \$1,310.50 owed to the International Fringe Benefit Funds, and \$9,007.50 owed to the Masonry Industry Trust Fund.

2. Liquidated damages

The CBA provides for liquidated damages equal to 10% of the amount of the delinquent contributions owed to the Masonry Industry Trust Fund. Thus, the court finds the plaintiff is entitled to liquidated damages in the amount of **\$900.75**, on the unpaid contributions owing to the Masonry Industry Trust Fund for 2009.

The CBA provides for liquidated damages equal to 20% of the amount of the delinquent contributions owed to the International Fringe Benefit Funds. Thus, the court finds the plaintiff is entitled to liquidated damages in the amount of **\$262.10**, on the unpaid contributions owing to the International Fringe Benefit Funds for 2009.

3. Interest

The plaintiff is entitled to interest on the amounts owed to the Masonry Industry Trust Fund at the rate of 18% per annum from the date due until the date paid. Interest on the 2009 amounts is calculated as follows:

(a) Amounts due for October 2009 were due by November 15, 2009.¹² Interest on \$6,167.56 at 18% from November 15, 2009, through January 9, 2012, totals \$2,387.61.

¹²See Dkt. #20, Ex. 1 (relevant excerpts of the CBA), p. 2, § 5.1(a) & (c).

1 (b) Amounts due for November 2009 were due by December 15,
2 2009.¹³ Interest on \$2,556.44 at 18% from December 15, 2009,
3 through January 9, 2012, totals \$951.84.

4 (c) Amounts due for December 2009 were due by January 15,
5 2010.¹⁴ Interest on \$283.50 at 18% from January 15, 2010, through
6 January 9, 2012, totals \$101.22.

7 The court therefore finds the plaintiff is entitled to recover
8 the sum of **\$3,440.67** in interest on 2009 delinquent contributions
9 to the Masonry Industry Trust Fund through January 9, 2012, with
10 interest continuing to accrue at the rate of **\$4.44 per day** until
11 paid.

12 The plaintiff is entitled to interest on the amounts owed to
13 the International Fringe Benefit Funds at the rate of 15% per annum
14 from the date due until the date paid. Interest on the 2009
15 amounts is calculated as follows:

16 (d) Interest on the \$864.80 due for October 2009, at 15% from
17 November 15, 2009, through January 9, 2012, totals \$278.99.

18 (e) Interest on the \$405.80 due for November 2009, at 15%
19 from December 15, 2009, through January 9, 2012, totals \$125.91.

20 (f) Interest on the \$39.90 due for December 2009, at 15% from
21 January 15, 2010, through January 9, 2012, totals \$11.87.

22 The court therefore finds the plaintiff is entitled to recover
23 the sum of **\$416.77** in interest on 2009 delinquent contributions to
24 332.81

27 ¹³*Id.*

28 ¹⁴*Id.*

1 the International Fringe Benefit Funds through January 9, 2012,
2 with interest continuing to accrue at the rate of **\$0.54 per day**
3 until paid.

4
5 **B. 2010 Contributions**

6 **1. Delinquent amounts due**

7 The plaintiff also seeks damages for unpaid contributions for
8 hours worked for the defendant by three employees in 2010. The
9 plaintiff has submitted payroll stubs for two employees, Jeffrey
10 Anderson and Robert Karlin, for work performed during 2010, as to
11 which the defendant failed to submit reports or to pay the required
12 contributions. See Dkt. #20, Exs. 8 & 9. The court finds the
13 plaintiff is entitled to recover unpaid contributions as to work
14 performed by these employees, as calculated below.

15 As to the third employee, Daniel Soares, the plaintiff has
16 estimated the hours he worked "based on information that Daniel
17 Soares worked similar hours as Robert Karlin during the period of
18 May 2010 to November 2010." Dkt. #20, ¶ 5. The plaintiff asks the
19 court to find the defendant liable for contributions based on this
20 estimate. The court will not enter a judgment that is based on
21 speculation or conjecture. The plaintiff has not offered any
22 evidence of the hours allegedly worked by Mr. Soares, and the court
23 finds counsel's estimate of the hours worked by Mr. Soares to be
24 insufficient grounds upon which to base a conclusion regarding
25 unpaid contributions owed by the defendant.

26 The pay stubs indicate Anderson worked a total of 545 hours
27 for the defendant during 2010, and Karlin worked a total of 584
28

hours for the defendant during 2010,¹⁵ for a total of 1129 hours for which contributions should have been made by the defendant. Delinquent contributions on these hours for 2010 total \$13,815.49 for the Masonry Industry Trust Fund, and \$1,693.50 for the International Fringe Benefit Funds,¹⁶ broken down as follows¹⁷:

Amounts Due for May 2010 (165 hours):		
International Fringe Benefits Funds	\$	247.50
Masonry Industry Trust Fund		1,948.65
Amounts Due for June 2010 (292 hours):		
International Fringe Benefits Funds	\$	318.00
Masonry Industry Trust Fund		2,609.72
Amounts Due for July 2010 (247 hours):		
International Fringe Benefits Funds	\$	490.50
Masonry Industry Trust Fund		4,025.37
Amounts Due for August 2010 (150 hours):		
International Fringe Benefits Funds	\$	225.00
Masonry Industry Trust Fund		1,846.50
Amounts Due for September 2010 (139 hours):		
International Fringe Benefits Funds	\$	159.00
Masonry Industry Trust Fund		1,304.86
Amounts Due for October 2010 (69 hours):		
International Fringe Benefits Funds	\$	153.00
Masonry Industry Trust Fund		1,255.62
Amounts Due for November 2010 (67 hours):		
International Fringe Benefits Funds	\$	100.50
Masonry Industry Trust Fund		824.77
TOTAL AMOUNTS DUE FOR 2010 (1129 hours):		
International Fringe Benefits Funds	\$	1,693.50
Masonry Industry Trust Fund		13,815.49
TOTAL DELINQUENT CONTRIBUTIONS FOR 2010	\$	15,508.99

¹⁵See Dkt. #21-1, Ex. 15, pp. 1 & 2.

¹⁶*Id.*

¹⁷*Id.*

1 Thus, the court finds the defendant owes the sum of **\$15,508.99**
2 in unpaid contributions for 2010, representing \$1,693.50 owed to
3 the International Fringe Benefit Funds, and \$13,815.49 owed to the
4 Masonry Industry Trust Fund.

5 **2. Liquidated damages**

6 The CBA provides for liquidated damages equal to 10% of the
7 amount of the delinquent contributions owed to the Masonry Industry
8 Trust Fund. Thus, the court finds the plaintiff is entitled to
9 liquidated damages in the amount of **\$1,381.55**, on the unpaid
10 contributions owing to the Masonry Industry Trust Fund for 2010.

11 The CBA provides for liquidated damages equal to 20% of the
12 amount of the delinquent contributions owed to the International
13 Fringe Benefit Funds. Thus, the court finds the plaintiff is
14 entitled to liquidated damages in the amount of **\$338.70**, on the
15 unpaid contributions owing to the International Fringe Benefit
16 Funds for 2010.

17 **3. Interest**

18 The plaintiff also is entitled to interest on the amounts owed
19 to the Masonry Industry Trust Fund at the rate of 18% per annum
20 from the date due until the date paid. Interest on the 2010
21 amounts is calculated as follows:

22 (a) Amounts due for May 2010 were due by June 15, 2010.
23 Interest on \$1,948.65 at 18% from June 15, 2010, through January 9,
24 2012, totals \$550.64.

25 (b) Amounts due for June 2010 were due by July 15, 2010.
26 Interest on \$2,609.72 at 18% from July 15, 2010, through January 9,
27 2012, totals \$698.83.31

1 (c) Amounts due for July 2010 were due by August 15, 2010.
2 Interest on \$4,025.37 at 18% from August 15, 2010, through January
3 9, 2012, totals \$1,016.38.

4 (d) Amounts due for August 2010 were due by September 15,
5 2010. Interest on \$1,846.50 at 18% from September 15, 2010,
6 through January 9, 2012, totals \$438.00.

7 (e) Amounts due for September 2010 were due by October 15,
8 2010. Interest on \$1,304.86 at 18% from October 15, 2010, through
9 January 9, 2012, totals \$290.22.

10 (f) Amounts due for October 2010 were due by November 15,
11 2010. Interest on \$1,255.62 at 18% from November 15, 2010, through
12 January 9, 2012, totals \$260.07.

13 The court therefore finds the plaintiff is entitled to recover
14 the sum of **\$3,254.14** in interest through January 9, 2012, on 2010
15 delinquent contributions to the Masonry Industry Trust Fund based
16 on hours worked by Anderson and Karlin, with interest continuing to
17 accrue at the rate of **\$6.81 per day** until paid.

18 The plaintiff is entitled to interest on the amounts owed to
19 the International Fringe Benefit Funds at the rate of 15% per annum
20 from the date due until the date paid. Interest on the 2010
21 amounts is calculated as follows:

22 (d) Interest on the \$247.50 due for May 2010, at 15% from
23 June 15, 2010, through January 9, 2012, totals \$58.28.

24 (e) Interest on the \$318.00 due for June 2010, at 15% from
25 July 15, 2010, through January 9, 2012, totals \$70.96.

26 (f) Interest on the \$490.50 due for July 2010, at 15% from
27 August 15, 2010, through January 9, 2012, totals \$103.21.

(g) Interest on the \$225.00 due for August 2010, at 15% from September 15, 2010, through January 9, 2012, totals \$44.48.

(h) Interest on the \$159.00 due for September 2010, at 15% from October 15, 2010, through January 9, 2012, totals \$29.47.

(i) Interest on the \$153.00 due for October 2010, at 15% from November 15, 2010, through January 9, 2012, totals \$26.41.

The court therefore finds the plaintiff is entitled to recover the sum of **\$332.81** in interest through January 9, 2012, on 2010 delinquent contributions to the International Fringe Benefit Funds based on hours worked by Anderson and Karlin, with interest continuing to accrue at the rate of **\$.70 per day** until paid.

C. Attorney Fees and Costs

The plaintiff also seeks its reasonable attorney fees and costs, including auditor fees, as provided by the Trust Agreements and by law. The plaintiff will submit its application for attorney fees and costs after entry of judgment. See Dkt. #20, ¶ 11.

D. Limitation of Judgment

The plaintiff requests that the judgment entered in this case expressly be directed toward the amounts requested in this action without limiting the plaintiff's right to seek recovery of additional amounts the defendant is determined to owe after an audit of the defendant's records. *Id.*, ¶ 9.

CONCLUSION

In accordance with the discussion and calculations set forth above, the undersigned recommends the plaintiff's motion for

1 default judgment be **granted in part and denied in part**, with
2 judgment to be entered for the plaintiff and against the defendant
3 as follows:

4 1) Total unpaid contributions for 2009 and 2010, limited to
5 the records currently available from the defendant and without
6 limitation to any action to recover further amounts shown to be due
7 after an audit of the defendant's records, in the amount of
8 **\$25,826.99;**

9 2) Liquidated damages on the unpaid contributions set forth
10 above in the amount of **\$2,883.10;**

11 3) Total interest on the unpaid contributions to the Masonry
12 Industry Trust Fund set forth above in the amount of **\$6,694.81**
13 through January 9, 2012, with interest continuing to accrue at the
14 rate of **\$11.25 per day until paid.**

15 4) Total interest on the unpaid contributions to the
16 International Fringe Benefit Funds set forth above in the amount of
17 **\$749.58**, through January 9, 2012, with interest continuing to
18 accrue at the rate of **\$1.24 per day until paid.**

19 5) The plaintiff's reasonable attorney fees and costs, to be
20 determined in accordance with Federal Rule of Civil Procedure 54
21 and Local Rule 54.

22 23 **SCHEDULING ORDER**

24 These Findings and Recommendations will be referred to a
25 district judge. Objections, if any, are due by **January 27, 2012.**
26 If no objections are filed, then the Findings and Recommendations
27 will go under advisement on that date. If objections are filed,
28

1 then the Findings and Recommendations will go under advisement on
2 the date of filing.

3 IT IS SO ORDERED.

4 Dated this _____ day of January, 2012.

5
6
7 Dennis James Hubel
8 Unites States Magistrate Judge
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28